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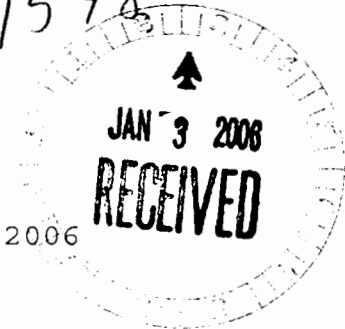
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ORIGINAL

Office of the Secretary

Surface Transportation Board

215480



BY HAND

January 3, 2006

Hon. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

RE: STB Finance Docket No. 34802, Petition of Pyco Industries, Inc., for Alternative Rail Service over the tracks and facilities of South Plains Switching Ltd.

Dear Mr. Williams:

On behalf of Petitioner Pyco Industries, Inc. (PYCO), I am enclosing an original and ten copies of PYCO's Rebuttal to the Reply of South Plains Switching Ltd (SAW). In addition, I am furnishing a copy for Mr. Mel Clemens, Director of the Board's Office of Compliance and Enforcement.

Pursuant to the Board's regulations on Expedited Relief for Service Emergencies at 49 CFR 1146, I am serving copies of this filing on the Federal Railroad Administration and my client, West, Texas & Lubbock Railway Co., Inc. PYCO's regular STB counsel, Charles Montange, will serve this filing on Thomas McFarland, counsel for SAW, and any other parties to this proceeding.

Please contact me if you have any questions

Sincerely yours,

A handwritten signature in black ink, appearing to read 'John D. Heffner'.

John D. Heffner

cc: Mr. Melvin Clemens
Charles Montange, Esq.
Thomas McFarland, Esq.
Mr. Edwin Ellis

CHARLES H. MONTANGE

ATTORNEY AT LAW

426 NW 162ND STREET

SEATTLE, WASHINGTON 98177

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3 January 2006
Express

Hon. Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 200036

Re: PYCO Industries -- Alternative
Rail Service -- South Plains
Switching, Ltd., F.D. 34802

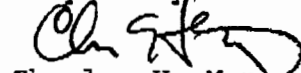
Dear Mr. Williams:

By separate cover and hand delivery on 3 January, Mr. Heffner, counsel for West Texas and Lubbock, has filed the Petitioner PYCO Industries' Rebuttal in the above captioned proceeding. That filing included fax signature pages. I am submitting herewith a duplicate copy with the original signature pages for the Kring Verified Statement and the Rebuttal itself.

By my signature below, I certify service of a copy of the Rebuttal by fax transmission on 3 January 2006 to Thomas McFarland, counsel for South Plains Switching, Ltd. I also certify service of this letter and the enclosure by express service, next day delivery, upon Mr. McFarland at 208 South LaSalle St, Suite 1890, Chicago, IL 60604-1112, and by similar service upon the Federal Railroad Administration at 1120 Vermont Ave., N.W., Washington, D.C. 20590.

Thank you for your assistance in this matter.

Very truly,



Charles H. Montange
counsel for PYCO Industries, Inc.

Encl.

cc. Gary McLaren, Esq. (w/encl.)
(for PYCO)
Thomas McFarland, Esq. (w/encl.)
(for SAW)
FRA (w/encl.)
John Heffner, Esq. (by fax)
(for WTL)

BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. --)
ALTERNATIVE RAIL SERVICE --) F.D. 34802
SOUTH PLAINS SWITCHING LTD.)



PETITIONER PYCO INDUSTRIES'
REBUTTAL
TO SAW REPLY

Office of the
General Counsel
JAN 3 2008
F.D. 34802

I. INTRODUCTION

This is the second time in less than a year that PYCO Industries has been faced with severe rail service inadequacies on the part of South Plains Switching Ltd. ("SAW") -- inadequacies threatening to shutdown PYCO's rail-dependent operations. The first instance occurred in the spring, with SAW's Mr. Wisener threatening to embargo all shipments to PYCO. This situation only cleared up after Mr. Clemens, Director of the Office of Compliance at this Board, threatened to recommend the institution of a Complaint against SAW on the Board's own initiative.¹

PYCO is now faced with a second imminent threat. Due to a severe curtailment of service by SAW on November 17, 2005, SAW is faced with mounting inventories. As indicated in the attached Verified Statement of Gail Kring, CEO and General Manager of PYCO, PYCO is projected of running out of storage space by January 24,

¹ See PYCO's Verified Petition and Exhibit A thereto; and Appendix I to this Rebuttal.

2006.² PYCO will have to begin shutting down operations well before that time, jeopardizing \$95 million in inventory and a company with a going concern value of \$150 million.³

Why did service deteriorate on November 17? PYCO explained in our Verified Petition that Mr. Wisener insisted that PYCO buy unspecified SAW assets for \$5.5 million. PYCO expressed interest in negotiating but indicated a need for due diligence. Mr. Wisener responded by terminating discussions, and threatening to make rail service miserable and expensive for PYCO commencing November 17. On or about that date, he terminated a track lease, placed derails to prevent interchange, renewed his instructions to his crew to provide one switch and to limit service to one haul per day, and further instructed his crew that they were not to spot cars on PYCO's scale track despite PYCO's repeated request. On November 18, he indicated that "[PYCO] would have to try to figure out how to take care of [itself]."⁴ Of course a petition such as this must follow.

² Kring Verified Statement ¶ 3 and Letter, Mr. Clemens (STB) to Mr. Wisener, dated June 1, 2005 (attached as Appendix I) (failure to resolve "will leave me no alternative but to recommend to the Board that we institute, on our own motion, a formal complaint proceeding to address the reasonableness of your actions and the appropriateness of damages to PYCO").

³ See PYCO Verified Petition, Exhibit C: Lacy Verified Statement para 22.

⁴ PYCO Verified Petition, Exhibit C: Lacy Verified Statement at attached Lacy Exhibit 3, notes of November 18 telephone conference with Larry Wisener.

Wisener in his replying Statement comes up with all kinds of excuses for making rail service miserable and expensive, but one thing his Statement cannot do: it cannot deny that Wisener's action was anything other than retaliatory.

Wisener now claims that if PYCO but asked, it could get an additional after-hours switch (for an additional \$500) each day. He insinuates PYCO does not want to pay this surcharge. This is laughingly ridiculous. SAW charges PYCO \$150 for "constructive placement" of cars that are backing up in storage due to SAW's inadequate service. It would save PYCO money if SAW would provide an additional switch, because it would avoid some of SAW's storage costs.⁵ But the true fact is that Wisener has repeatedly told PYCO since 2002 that he would not provide an additional switch.⁶ Moreover, on November 22, 2005, SAW's crew informed PYCO that the reason they were not providing switching services needed by PYCO was because "Larry" (i.e., Mr. Wisener) instructed them NOT to do so.⁷ In short, Wisener's statement to this Board is an all too tardy cover up of his prior indefensible position.

PYCO was previously informed by STB staff that the Board has a remedy for a shipper like PYCO who are told by their incumbent

⁵ Kring Verified Statement ¶ 9f. See also ¶ 7.

⁶ Kring Verified Statement ¶ 9f. See also ¶ 7.

⁷ See PYCO Verified Petition, Exhibit C: Lacy Verified Statement, exhibit 3 thereto, notes from November 22 ("Larry would only allow [crew] to do one pull per day").

rail provider that rail service would henceforth be miserable and expensive, and that the shipper would have to "figure out how to take care of [itself]." That remedy is a petition for alternative rail service under 49 C.F.R. Part 1146. PYCO prepared a draft petition last spring, but the Board got the matter resolved before it had to be filed. But now PYCO faces an imminent shutdown. If a remedy exists for service inadequacies while matters are sorted out, now is the time for deployment of that remedy.

In his Statement, Mr. Wisener refers to derailments. PYCO's tracks were repaired some months ago, and derailments have not been a problem since. In any event, as Mr. Ellis explains in his Verified Statement (paragraph 7) attached as Appendix II, SAW's approach is "shocking."

Further information responsive to issues raised by Mr. Wisener is provided in both the Verified Statement of Gail Kring, inserted below, and in the Verified Statement of Mr. Ellis, attached as Appendix II. Mr. Kring has worked for PYCO for 39 years and is its Chief Executive Officer and Manager. Mr. Ellis President of Permian Basin Railways, which owns and operates four short line railroads in the western part of the United States, including West Texas and Lubbock Railroad (WTL), PYCO's proposed alternative rail service provider here.

II. VERIFIED STATEMENT OF MR. KRING

BEFORE THE SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. --)
ALTERNATIVE RAIL SERVICE --) F.D. 34802
SOUTH PLAINS SWITCHING, LTD.)

VERIFIED STATEMENT OF MR. GAIL KRING

I, Gail Kring, make this verified statement in rebuttal to the statement filed by Mr. Larry Wisener on behalf of South Plains Switching, Inc. ("SAW"), in this proceeding, and in support to the petition for alternative rail service filed by PYCO.

1. I am the Chief Executive Officer and General Manager of PYCO Industries, Inc., and have been employed by PYCO for 39 years.

2. I have read the Reply in Opposition filed by SAW in this proceeding, and all attachments thereto. The Reply and attachments are either incorrect or misleading. I will summarize PYCO's corrections below.

3. I begin by noting the customer surveys on which basis Mr. Wisener claims to provide "excellent" service. Mr. Wisener implies the surveys were in 2004; to the best of PYCO's knowledge, they were in 2003 -- that was the last survey PYCO filled out. Since SAW dismisses the episode involving admitted service inadequacies by SAW in early 2005 as irrelevant to the current condition, it is clear that surveys relating to service in 2003, or even 2004, are likewise irrelevant. PYCO admits it received adequate service from SAW until the beginning of 2005. At that point, two things happened: (a) Mr. Wisener got into a dispute with BNSF, and (b) per

PYCO's own data, demand for switching services approximately doubled. SAW caused service to deteriorate due to its dispute with BNSF, or service deteriorated due to SAW's lack of staff and equipment to serve sustained increased demand. As indicated in our initial petition, this Board's Office of Compliance, through Mr. Clemmons, in essence told Mr. Wisener to stop pointing fingers at others. Service improved. This makes us believe that the service inadequacy was due to Mr. Wisener's challenging personality rather than lack of personnel and equipment. In any event, in October, Mr. Wisener demanded that PYCO buy some undescribed part or all of SAW from him for \$5.5 million. PYCO responded that it would require some due diligence before PYCO could sign such a contract. Mr. Wisener in a huff informed PYCO that trouble lie ahead, and service immediately deteriorated, to the point that PYCO's business is now jeopardized. This again suggests that Mr. Wisener has no understanding of common carrier obligations, or a personality problem preventing him from discharging as opposed to manipulating those obligations. Because Mr. Wisener emphasizes threats and attempts to intimidate, and indicates that he likes to throw or threaten to throw people out of his office rather than negotiate, it is difficult to believe statements by him that he would negotiate as solution to a problem, much less assist in resolving it.

4. The long and short of all this is that Mr. Wisener's

verified statement is a smokescreen. The short answer to Mr. Wisener is to ask why then did service deteriorate suddenly in November when PYCO declined to pay him \$5.5 million without due diligence? What PYCO is experiencing appears to be, and is, nothing more than Mr. Wisener's retaliatory refusal to provide service on reasonable request because PYCO did not obligate itself to cash him out of railroad property he purchased for \$1. In addition, as discussed below, Mr. Wisener's statement implicitly admits he lacks the capacity to serve PYCO, at least during normal hours of operation.

5. There are three main claims with which I wish to deal in regard to statements made by Mr. Wisener in his Verified Statement filed in this proceeding: (a) the claim that SAW provides excellent service, (b) the claim that all PYCO needs to do is ask for additional service, and (c) the claim that PYCO's track is unsafe apparently for any service.

6. Mr. Wisener relies on some favorable customer surveys which he alleges are from 2004 for the claim that he provides excellent service. As best we can make out, the last customer surveys by SAW were in 2003. The issue in this alternative service case is not whether SAW provided excellent service in 2003, or even in 2004, but whether SAW is providing adequate service now. SAW is not. PYCO is the largest shipper on SAW and will be forced to close down within approximately 20 days unless service dramatically

improves. We have also obtained a letter of support from Floyd Trucking, dated December 27, 2005 (copy attached) also indicating SAW's service is inadequate. Floyd Trucking is a former shipper on SAW. When Floyd Trucking sought to make track repairs through a contractor other than SAW, Mr. Wisener retaliated against Floyd Trucking. Mr. Floyd states that when he complained to STB, SAW was compelled to offer a service contract, but the terms were so onerous Floyd Trucking could not economically use SAW services. I have participated in the last few days in a personal survey of other SAW users. All whom I have contacted support SAW's position but indicate that they are afraid to put anything in writing for fear of retaliation by SAW in the event PYCO is unsuccessful in obtaining alternative service for shippers currently dis-served by SAW.

7. Mr. Wisener at pages 4-5 seems to indicate that all PYCO needs to do is meet with Wisener, at which point he intends (now) to explain that SAW will provide additional switching at night at the rate of \$500 per switch. As the Wisener statement implies, this is the first he has come up with this idea, and obviously it is an excuse in response to our petition for alternative service. What actually happened is that Mr. Wisener, who knew we needed rail service, informed us in November that he would provide only about half of what we need. In his verified statement, Mr. Wisener intimates that he cannot supply two switches per day to PYCO

because his current crew is limited to a twelve hour day. But Mr. Wisener was able to provide PYCO with service during that twelve hour day until November 17, which was when he indicated he would begin retaliating against PYCO for declining to sign a contract to buy some or all of the SAW property for \$5.5 million without any due diligence and without financial arrangements. Although Wisener now says he has personnel to provide an after-hour switch (at a surcharge of \$500), he previously repeatedly told PYCO that he did not have personnel for that purpose and would not provide it. His statements in his verified statement are inconsistent with several years worth of prior statements to us. Our proposed alternative rail supplier (West Texas and Lubbock) can supply our needs immediately in January so we do not have to shut down our business; moreover, we can continue to operate during normal business hours.

8. Mr. Wisener's claim that PYCO's track is unsafe is belied by the fact that SAW operated successfully on it, and that SAW's trackmobile (referenced in Mr. Wisener's statement) also operated successfully on it. The derail incident occurred last spring, during a period that Mr. Wisener's counsel states SAW "need not address" (Reply at 1) as somehow irrelevant. It is also belied by the fact that West Texas and Lubbock Railroad is willing to provide PYCO with service. And if PYCO's track is somehow to blame, then how can that second switch Mr. Wisener suddenly offers be a

solution? In the end, all we have is smoke, mirrors, and finger pointing, just as we had last spring, when the Director of the Office of Compliance, Mr. Clemmons, properly demanded that SAW stop finger pointing and instead provide service.

9. In this paragraph, I will go through Mr. Wisener's claims on a more detailed page by page basis.

a. Wisener at p. 1, paragraph 2, refers to customer surveys in 2004. The only survey filled out by PYCO was in 2003, and the only survey furnished by Wisener bearing a date is dated September 26, 2003. There are two explanations for favorable surveys in 2003 or even 2004: (i) it is unwise to criticize Mr. Wisener's rail service because he retaliates, or (ii) SAW service in 2003 or even 2004 was better than in 2005.

b. Wisener at p. 1, paragraph 3, claims that PYCO's sidetrack is insufficient to accommodate adequate carloadings. Infrastructure was adequate until November 17.

c. Wisener a pp. 1-2 refers to his heretofore unmentioned idea of providing after-hours service to PYCO for a \$500 surcharge per day. This tariff is discriminatory. Wisener is not imposing it on any other shipper. Nor is he imposing his other discriminatory surcharges on other shippers.

d) Wisener at pp. 2-4 claims the petition arises from Wisener's refusal to allow PYCO to use its trackmobile on SAW trackage. Wisener claims that such operation violates regulations,

derailments, and a near fatal accident. PYCO filed the petition in order to obtain adequate rail service. PYCO need not operate its trackmobile in SAW's yard to switch cars if SAW will provide service. PYCO filed its petition in order to obtain adequate service. PYCO acknowledges that there were some derailments several months ago, but as Wisener's receipts indicate, PYCO picked up the cost. These did not adversely affect service until November 17. PYCO has polled its employees and no employee fell from a rail car as suggested by Wisener in his statement.

e) Wisener at p. 4 states he invited PYCO to a meeting. PYCO understood that Mr. Wisener wanted us to attend so he could "throw people out of his office." Until the filing of his verified statement, he never offered any options to PYCO for adequate rail service. In fact, SAW only operates with one crew, and Wisener has repeatedly told PYCO that he does not have enough personnel to provide additional service. There has never been an offer of additional switching from him since 2002. Based on Mr. Wisener's repeated statements to PYCO, PYCO is informed and believes that SAW has insufficient personnel and/or equipment to perform the switching that Wisener now claims he is prepared and able to provide after hours.

f) Wisener at p. 5 says that PYCO simply "does not want to pay the tariff charge for the extra switch." As I have indicated, until this week Mr. Wisener's position was that he had no personnel

to provide an extra switch. Whether PYCO should be paying a surcharge depends on whether it is discriminatory. Based on our discussions with other shippers, we understand that PYCO is the only shipper served by SAW that is paying surcharges. PYCO is currently paying SAW a \$150 per car surcharge for constructive placement, and a \$20 surcharge for every loaded cars. Paying \$500 for an additional switch would save us money given PYCO's \$150 per car surcharge for constructive placement, so it is ridiculous for Wisener to claim we are simply unwilling to pay his new surcharge for an additional switch. At p. 5, Wisener refers to extra switching he did for PYCO in 2002. Wisener informed us subsequently that he lacked personnel for extra switching.

g) Wisener at pp. 6-7 again claims PYCO's track has inadequate clearances or other safety issues. Although concealed by the photos presented by Wisener, PYCO's trackage has proper warning signs, and track conditions are the same as when SAW acquired its lines from BNSF. SAW provided service over the track without complaint until PYCO refused to buy SAW on the terms dictated by Wisener. Mr. Wisener's statements about track conditions are a made-up alibi, not a valid excuse. SAW has never approached PYCO to express any concerns about safety of SAW employees or about the "dangerous" condition of any PYCO trackage.

h) Wisener at p. 8 states that PYCO is under the impression that SAW was responsible for PYCO's boxcar supply at PYCO's plant

2. Here Mr. Wisener is correct. He told us emphatically this year that "I [Wisener] take care of ordering the boxcars." Mr. Wisener now disavows responsibility. PYCO evidently should not have taken Mr. Wisener at his word. Nor should this Board.

i) PYCO has paid the SAW invoices according to the terms of the tariff. The tariff now includes surcharges which were not levied against PYCO until PYCO refused to sign the agreement sent to PYCO by SAW for the purchase of SAW. No other shipper pays these surcharges. This is an example of Mr. Wisener's retaliatory nature. PYCO reserves all its rights to contest the surcharges as unlawful and discriminatory.

10. SAW's counsel, Mr. McFarland, suggests that SAW's service is "adequate" and that PYCO's "service desires are unrealistic." McFarland "Legal Argument" at p. 2. PYCO was receiving adequate service until November 17. No physical change occurred on that date to preclude continued adequate service. What happened was that Mr. Wisener disrupted service to PYCO in retaliation for PYCO's refusal to agree to Wisener's terms and conditions for the sale of SAW without any due diligence at all. This disruption followed major disruptions several months earlier when Mr. Wisener manipulated service to PYCO in response to his legal disputes with BNSF. Our expectation about what constitutes adequate service is thus hardly "unrealistic." Mr. McFarland repeats Mr. Wisener's claim that PYCO could simply obtain an additional after hours

switch each day, but this is the first time such news has reached PYCO. Heretofore, as I have indicated, Mr. Wisener repeatedly has said to PYCO that SAW does not have the personnel for such switches. West Texas and Lubbock, on the other hand, has the crew and personnel to provide adequate service to PYCO, and to all shippers on SAW tracks.

11. PYCO is a large rail dependent company. We have never experienced such dismal rail service. As we indicated in our original Petition, we will run out of storage space for our inventory in mid-January due to inadequate rail service and will be forced to shut down. Current service by SAW is not viable. I attach hereto our current projections showing we run out of storage capacity on or about January 24, 2006, given current rail service inadequacies.

12. Although making contacts over the holidays is difficult, I have personally approached other shippers on SAW's line to obtain their views on our Petition. All have indicated oral support but, save one, are afraid to express their position in writing for fear of retaliation in the event we are unsuccessful. The exception, Floyd Trucking, has provided a letter of support. Mr. Floyd states that his company also views service as inadequate, and he joins in our petition. Mr. Floyd indicates to PYCO that SAW has already retaliated against Floyd Trucking to the point Floyd has been driven off the line.

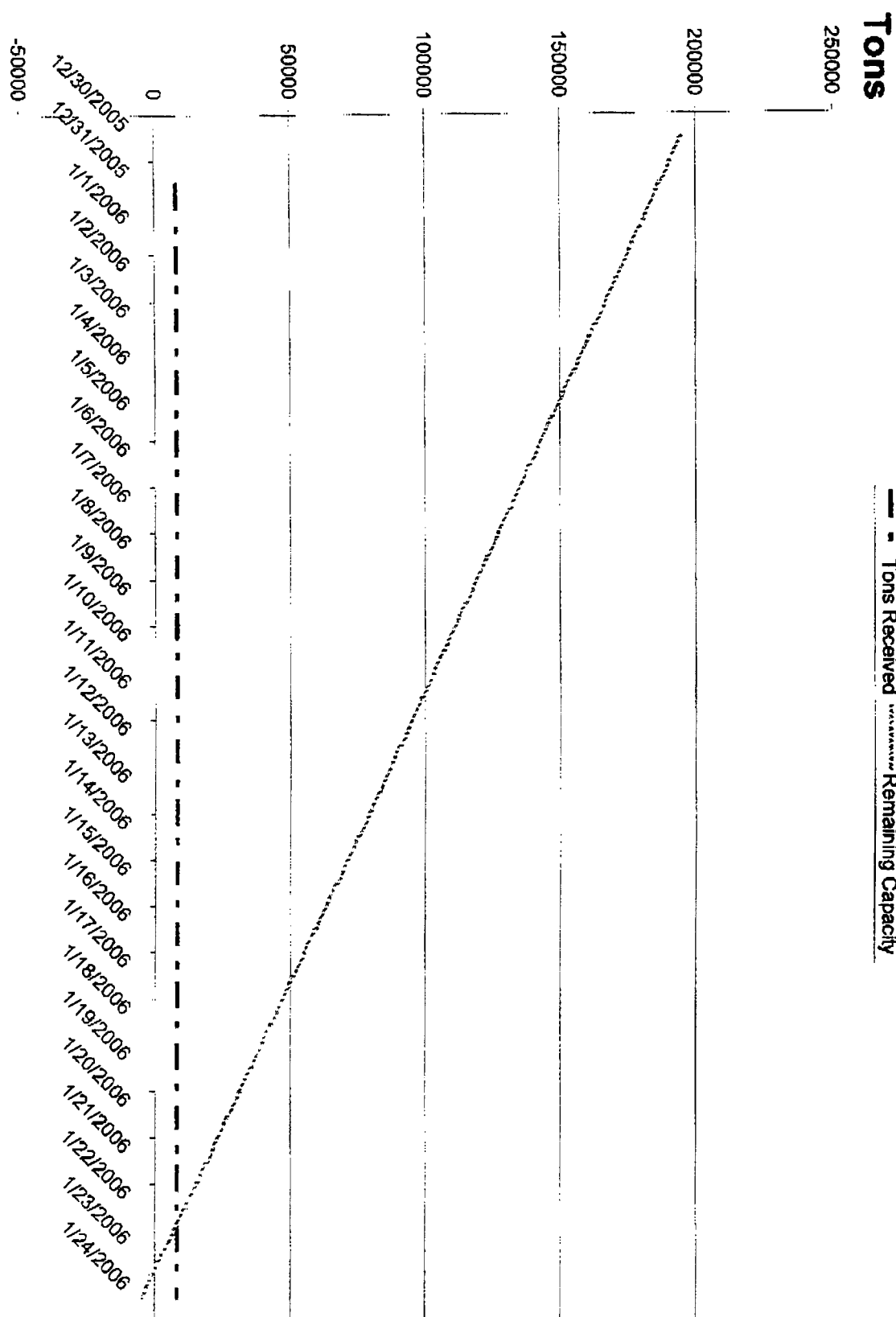
Pursuant to 28 U.S.C. § 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 12-30-05.

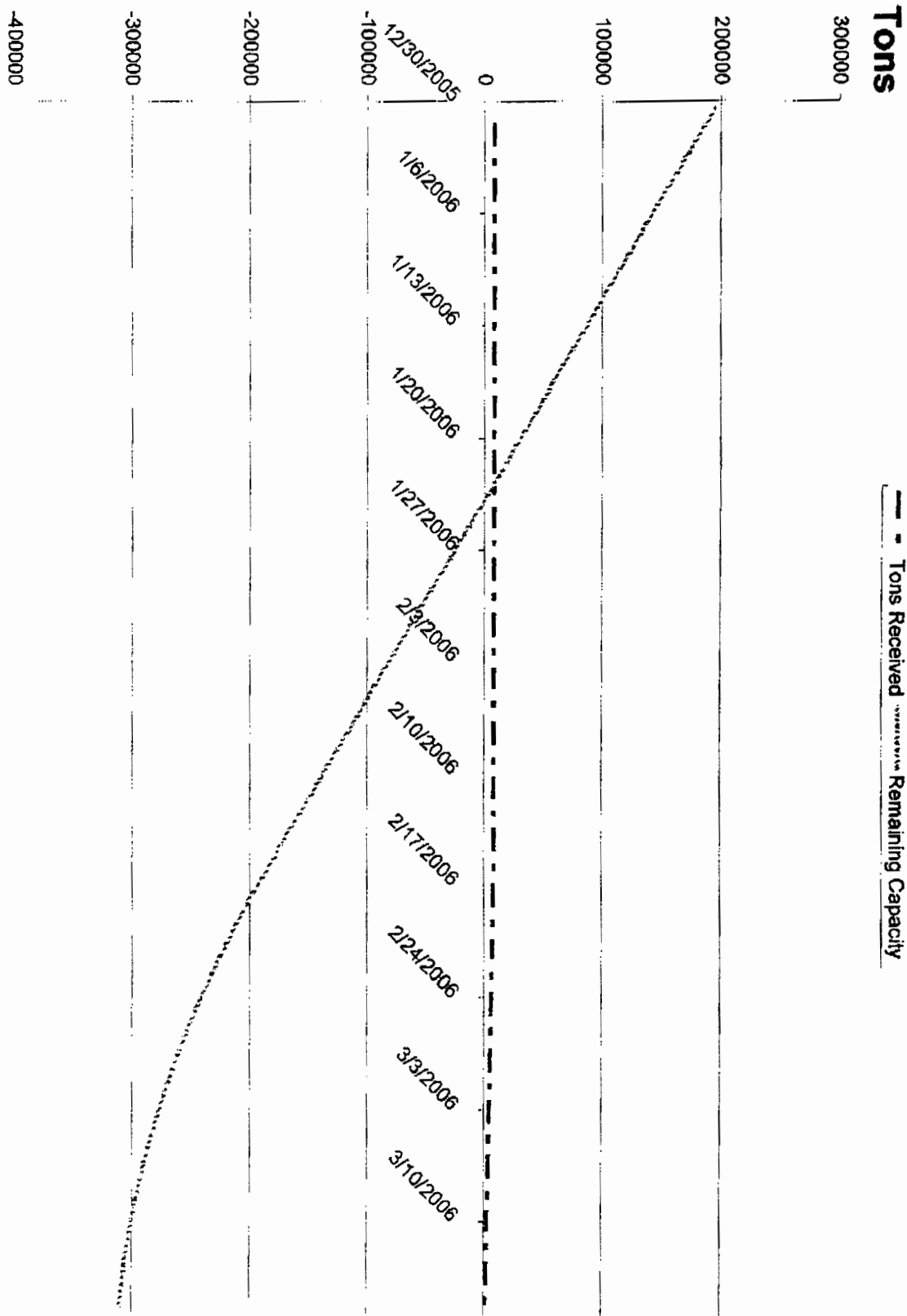
Carl King

PYCO Industries, Inc.
Projected Fill to Capacity Date.xls
Data Assumptions

Date	Tons Received	Remaining Capacity	Date	Tons Received	Remaining Capacity
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12/31/05	8,000	187,000	02/05/06	8,000	(101,000)
01/01/06	8,000	179,000	02/06/06	8,000	(109,000)
01/02/06	8,000	171,000	02/07/06	8,000	(117,000)
01/03/06	8,000	163,000	02/08/06	8,000	(125,000)
01/04/06	8,000	155,000	02/09/06	8,000	(133,000)
01/05/06	8,000	147,000	02/10/06	8,000	(141,000)
01/06/06	8,000	139,000	02/11/06	8,000	(149,000)
01/07/06	8,000	131,000	02/12/06	8,000	(157,000)
01/08/06	8,000	123,000	02/13/06	8,000	(165,000)
01/09/06	8,000	115,000	02/14/06	8,000	(173,000)
01/10/06	8,000	107,000	02/15/06	8,000	(181,000)
01/11/06	8,000	99,000	02/16/06	8,000	(189,000)
01/12/06	8,000	91,000	02/17/06	7,750	(196,750)
01/13/06	8,000	83,000	02/18/06	7,500	(204,250)
01/14/06	8,000	75,000	02/19/06	7,250	(211,500)
01/15/06	8,000	67,000	02/20/06	7,000	(218,500)
01/16/06	8,000	59,000	02/21/06	6,750	(225,250)
01/17/06	8,000	51,000	02/22/06	6,500	(231,750)
01/18/06	8,000	43,000	02/23/06	6,250	(238,000)
01/19/06	8,000	35,000	02/24/06	6,000	(244,000)
01/20/06	8,000	27,000	02/25/06	5,750	(249,750)
01/21/06	8,000	19,000	02/26/06	5,500	(255,250)
01/22/06	8,000	11,000	02/27/06	5,250	(260,500)
01/23/06	8,000	3,000	02/28/06	5,000	(265,500)
01/24/06	8,000	(5,000)	03/01/06	4,750	(270,250)
01/25/06	8,000	(13,000)	03/02/06	4,500	(274,750)
01/26/06	8,000	(21,000)	03/03/06	4,250	(279,000)
01/27/06	8,000	(29,000)	03/04/06	4,000	(283,000)
01/28/06	8,000	(37,000)	03/05/06	3,750	(286,750)
01/29/06	8,000	(45,000)	03/06/06	3,500	(290,250)
01/30/06	8,000	(53,000)	03/07/06	3,250	(293,500)
01/31/06	8,000	(61,000)	03/08/06	3,000	(296,500)
02/01/06	8,000	(69,000)	03/09/06	2,750	(299,250)
02/02/06	8,000	(77,000)	03/10/06	2,500	(301,750)
02/03/06	8,000	(85,000)	03/11/06	2,250	(304,000)
			03/12/06	2,000	(306,000)
			03/13/06	1,750	(307,750)
			03/14/06	1,500	(309,250)
			03/15/06	1,250	(310,500)



PYCO Industries, Inc.
Projected Fill To Capacity Date
Receiving 8000 Tons Day Avg



PYCO Industries, Inc.
Projected Fill To Capacity Date
Receiving 8000 Tons Day Avg

12/16/2005 16:19 8067452741

FLOYD TRUCKING, INC.

PAGE 01

FLOYD TRUCKING, INC.

CERTIFIED DBE & HUB CONTRACTOR

P. O. BOX 3456

LUBBOCK, TEXAS 79452

PH. 806-745-2729 FAX 806-745-2741

December 27, 2005

Hon. Vernon Williams, Secretary
Surface Transportation Board
1825 K Street, N.W.
Washington, D. C. 20423-0001

Re: PYCO Industries, Inc.-Alternative Rail Service-South Plains Switching, Ltd.,
F.D. 34802

49 C.F.R. Part 1146: expedited
relief for service inadequacies

Expedited Treatment Requested

Dear Mr. Secretary:

This letter on behalf of Floyd Trucking, Inc. (hereinafter referred to as "Company"), is to indicate that "Company" wishes to join in the petition filed by PYCO Industries, Inc., in the above captioned proceeding seeking expedited relief for service inadequacies. Like PYCO Industries, "Company" is a captive shipper to the incumbent carrier, South Plains Switching, Ltd. ("SAW"), in Lubbock, Tx. Like PYCO, "Company" has experienced inadequate rail service.

"Company" has repeatedly tried to obtain service in the past, and been given excuses such as "rail is out of service" but according to Nancy Belter of your office, the track was never out of service.

Also, Mr. Wisener said the track would not pass inspection, but upon having Santa Fe Railroad Inspector, Ricky Phillips, inspect the track, he said it was okay and would pass inspection.

After we corresponded with Mr. Clemens numerous times, Mr. Wisener agreed to give us service. He then sent us a contract to sign that was entirely unacceptable.

Sincerely,


Floyd Trucking, Inc.

O. E. Floyd, General Manager

OEF:jf

III. ARGUMENT

SAW argues that this Board in adopting the alternative service regulations made clear that alternative service was appropriate where "transportation needs were crucial" and was not appropriate to address "individual service desires." 3 S.T.B. at 974. SAW claims that rail service by SAW is "adequate" and PYCO merely has "unrealistic ... service desires." SAW Legal Argument at 2.

This is a strange contention in the face of undisputed evidence that SAW was meeting PYCO's needs until Mr. Wisener directed his company to cease doing so on November 17 and instructed PYCO on November 18 to "figure out how to take care of [itself]." At that time, Mr. Wisener among other things instructed his employees (i) to install a derail not only preventing PYCO from interchanging but also encumbering PYCO's movement of cars between its scale and yard tracks, (ii) to provide only one switch to PYCO per day, and (iii) not to spot cars on the "scale" track. In addition, SAW cancelled a lease of trackage to PYCO for car storage. The actions were not associated with safety issues or suddenly increased demand by PYCO, but with Mr. Wisener's obvious angst that PYCO refused to cash him out by buying some unspecified part or all of SAW for \$5.5 million.

SAW cleverly attempts to disguise what happened with what amounts to smoke and mirrors. Citing some line-haul rate cases, SAW claims that its common carrier obligation does not require it

to place cars inside the fence (i.e., on the "scale track" as well as the "shop track") at PYCO. SAW Legal Argument at 4. This argument is not correct legally or factually. SAW is not what most mortals would regard as a "line-haul" carrier; instead SAW is supposedly providing services in the former BNSF sidings and railyards in Lubbock by sharing in a division of BNSF's line-haul rates.¹ Under a line-haul rate, a common carrier (including SAW) is obligated to place cars "in a position as to make them accessible" to the customer. What this means varies from case to case. In some cases, it means spotting the cars on a team track and allowing time to unload. In some cases it means spotting cars on an interchange track so the customer can move them to the customer's final destination. In other cases, it means spotting the cars on the customer's private siding.² In all cases it means getting the cars to the customer.

¹ However, SAW is surcharging PYCO for each car delivered (\$20 per car) and for each car "constructively placed" (\$150 per car) while awaiting delivery under SAW's newly constrained system of delivery. No other customer of PYCO is subject to these surcharges. Under normal industry practice, there should be no surcharge for cars delivered to PYCO. Verified Statement of Mr. Ellis, Appendix II, paragraphs 4 and 5. The charges are discriminatory in violation of 49 U.S.C. § 10741. It is ironic that PYCO is paying SAW in excess of the line-haul rate in contravention of industry practice and § 10741 and is still receiving inadequate service. It is doubly ironic that SAW pretends to defend this practice through reliance on cases involving services covered by line-haul rates.

² E.g., Secretary of Agriculture v. United States, 347 U.S. 645, 646 (1954).

In the case of PYCO, team tracks do not work. Cars historically either are spotted on PYCO's private sidings, or PYCO has used its own equipment to move the cars from what amounts to SAW's "interchange tracks" to PYCO's private sidings.

Mr. Wisener after November 17 refused to spot on the "scale" siding, arguing that it is inside a fence and somehow unsafe. There is nothing magic about spotting rail cars in a fenced area. See Verified Statement of Mr. Ellis, attached as Appendix II, para. 6 (industry practice is to operate on tracks like PYCO's scale tracks). Mr. Ellis in his Verified Statement indicates that his railroad (WTL) has inspected the tracks, including PYCO's scale track, and not only could operate safely, but also that such operation would be standard industry practice. See id. In short, there is no safety obstacle to providing service on the scale track.³

SAW, however, is correct in its statement⁴ that spotting cars

³ Wisener in his statement also claims that a PYCO employee was seen falling off a car, citing this as an example of safety issues. This is the first PYCO heard of such an incident, and immediately investigated it. PYCO employees deny any such incident. Gail Kring V.S. at paragraph 9(d). If such an incident occurred, SAW's crew should have advised Mr. Wisener immediately, and he should have raised it with PYCO immediately so corrective measures could have been taken. Mr. Wisener's claim in this regard either is false or suggests that SAW, not PYCO, is lacking in appropriate safety practices.

⁴ SAW Legal Argument at 4 ("a few more cars per day would not result in the level of service that PYCO has alleged to be necessary").

on the scale track rather than the shop track would merely ameliorate rather than solve PYCO's problem. SAW's refusal to spot cars on the scale track serves to illustrate SAW's effort after November 17 is to squeeze PYCO by providing inadequate service to retaliate against and to punish PYCO for refusing to cash Mr. Wisener out of SAW by writing a \$5.5 million dollar check without any due diligence and without a definition even of the assets to be acquired.

Mr. Wisener also refuses to allow PYCO to continue to rely on its own equipment to interchange cars. Mr. Wisener excuses this on the ground that PYCO does not have a Federal Railroad Administration (FRA) certified engineer. There is no requirement that PYCO have an FRA certified engineer; indeed, FRA does not certify engineers. FRA requires railroads to self-certify their engineers (i.e., have a training program and document to FRA compliance). If SAW felt that PYCO employees required additional training under SAW's program (or be certified as engineers), then PYCO should provide it as part of the discharge of its obligation to PYCO to provide service. Verified Statement of Mr. Ellis, Appendix II, para. 8. That, rather than Mr. Wisener's rather stunning claim of a legal right to be irresponsible, would meet industry standards for providing adequate common carrier service in the circumstances here. Id. As Mr. Ellis states in his Verified Statement, Appendix II, paragraph 8,

"placement of the derail [so as to prevent a customer from conducting a switch] increases SAW's common carrier switching obligation by removing the capability of the industry to do its own switching."

Thus, if SAW does not allow PYCO to interchange, SAW itself must provide the switching service. SAW certainly cannot claim it is making cars reasonably accessible when it denies PYCO the ability to interchange, claims that it lacks personnel or equipment to spot cars for PYCO during normal business hours, and then offers an after hours switch for a \$500 fee in response to an alternative service petition.

Mr. Ellis also makes clear the spurious nature of SAW's alleged safety concern for interrupting PYCO's ability to interchange. Mr. Ellis articulates the following options: (i) qualify an industry employee under the railroad's rules and/or certification as an engineer, (ii) provide an operating window, or (iii) place the derail at a location that permits the carrier and the customer to operate without conflict. Verified Statement of Mr. Ellis, attached as Appendix II, paragraph 8.

Again, what Mr. Wisener is doing is simply retaliating at PYCO for failing to write a \$5.5 million check to SAW for assets (if any) to be determined by Mr. Wisener at his discretion later. Indeed, since SAW charges \$150 for constructive placement of backed up cars bound for PYCO, Mr. Wisener makes money off providing

inadequate service to PYCO.

SAW does not contest that PYCO needs more rail cars, nor does SAW contest that PYCO is rail dependent and cannot shift to trucks. Moreover, SAW does not contest that PYCO is running out of storage capacity and faces an imminent shut down. SAW does not contest that these conditions arose as a result of decisions taken by Mr. Wisener on November 17, 2005. SAW does not deny that Mr. Wisener told PYCO to take care of itself. SAW simply seeks to excuse Wisener's decision to disrupt PYCO's service on the ground of alleged conditions or events that Mr. Wisener indicates occurred some time in the past. Many of those conditions no longer apply, or could and should be dealt with by SAW and Mr. Wisener in a fashion so that adequate rail service is provided. None of SAW's excuses work to explain or vindicate the inadequate service at issue now.

Mr. Wisener's claims about a safety requirement for FRA certified engineers is also relevant to that portion of PYCO's petition asking for possible relief in the form of an alternative service order authorizing PYCO to go onto SAW tracks for purposes of interchanging cars. PYCO acknowledges that it is not a licensed (STB-regulated) railroad. However, there is no such thing as an FRA-certified engineer; railroads self-certify their engineers. PYCO does not understand there to be any regulation requiring it to be licensed railroad in order to go onto SAW track to interchange.

If this Board believes such a license (STB authorization) is necessary in the case of an alternative service petition, then PYCO reiterates that if this Board authorized PYCO to provide its own alternative switching service, PYCO would file a 7-day notice as provided under 49 C.F.R. 1150.31 and become a licensed carrier (PYCO may organized a special subsidiary for this purpose) if that is a condition of the Board's order. As already noted, there is no FRA certification of engineers. Railroads self-certify based on training programs. While SAW presumably has a training program (and as noted could use that to familiarize PYCO personnel with applicable rules for SAW tracks), PYCO if necessary will provide its own program to FRA for purposes of self-certification, and otherwise comply with all FRA requirements, including any requirements for engineer certification. Allowing a shipper to organize itself as a carrier in order to provide its own alternative rail service is a form of relief anticipated by this Board in adopting its alternative service regulations, as we indicated in our Petition at p. 2 n.2.

While PYCO prefers alternative service from an experienced, able and willing carrier like WTL, PYCO eventually would be assisted by an alternative service order at least permitting PYCO to operate on SAW's trackage.

As to SAW's alleged willingness to provide a second switch referenced in SAW's "Legal Argument," this switch evidently would

be sometime in the night by a new crew at an additional charge of \$500 per switch. This new-found willingness is certainly not what SAW previously represented to PYCO. Since 2002, Mr. Wisener has insisted his railroad would provide only one switch per day, often coupled with statements that SAW lacked personnel for more. Between November 17 and the date of Mr. Wisener's statement in Reply to PYCO's alternative service petition, the consistent position of SAW was that PYCO would provide only one switch. This was coupled with Mr. Wisener's warning that PYCO must now "take care of [itself]" and with other actions degrading rather than supporting adequate service. See Verified Statement of Gail Kring, supra, ¶¶ 9f & 7.

SAW claims that the boxcar problem is due to BNSF (Legal Argument at 5), but Mr. Wisener told PYCO that he (SAW) was responsible. See Verified Statement of Gail Kring, supra, ¶ 9h. Indeed, a carrier such as SAW is responsible, and should not simply point fingers at BNSF. See Verified Statement of Mr. Ellis, attached as Appendix II, answer to question 6 (common carrier obligation includes supply of cars, BNSF's commitment is only to make "reasonable efforts" to supply cars, BNSF often is unable to supply cars, and WTL leases cars itself to ensure its customers have an adequate supply).

SAW does not contest the ability of West Texas and Lubbock Railroad (WTL) to operate adequately and safely on the premises.

WTL can serve all SAW customers in Lubbock. WTL can provide adequate service for PYCO without the need and additional time required for PYCO to establish its own licensed carrier. Mr. Ellis in his Verified Statement attached in Appendix II (paragraphs 4-7 & 9) offers further assurance that his railroad has inspected the track, and can provide the required service safely. Time is now very critical.

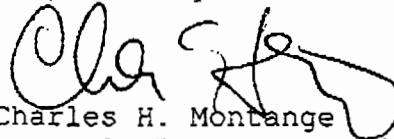
IV. CONCLUSION

For the reasons stated in our Petition, this Rebuttal, and in the supporting documents, PYCO requests that an alternative service order be entered for the maximum period allowed by 49 U.S.C. 11123 and any other applicable authorities. This will allow PYCO immediately to avoid further inventory build-up, and this in turn is vital to avoid plant shut down in mid-January. A respite will hopefully permit the work down the current inventory.

PYCO's experiences with Mr. Wisener in 2005 leave PYCO secure in the knowledge that the alternative to alternative rail service is a shut down of PYCO's Lubbock facilities, most likely around the middle of January. As Mr. Kring states, "[c]urrent service by SAW is not viable."⁵

⁵ Gail Kring Verified Statement, supra, ¶ 11.

Respectfully submitted,



Charles H. Montange
Counsel for PYCO Industries,
Inc.

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(806) 788-0609
for PYCO Industries, Inc.

CERTIFICATE OF SERVICE

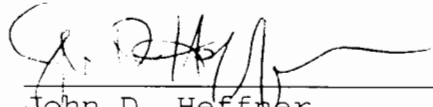
I, John D. Heffner, certify that a copy of the foregoing Petition of Pyco Industries, Inc., for Alternative Rail Service was served on January 3, 2006 to the following:

Mr. Melvin Clemens (hand delivery)
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

Thomas F. McFarland, Esq. (Fax & FedEx)
Thomas F. McFarland, P.C.
208 South LaSalle Street
Suite 1890
Chicago, IL 60604

Mr. Edwin Ellis (first-class mail)
Iowa Pacific Holding, LLC
P.O. Box 618181
Chicago, IL 60661

Federal Railroad Administration
1120 Vermont Avenue, NW
Washington, DC 20590



John D. Heffner

Appendix I

Letter, Mr. Clemens to Mr. Wisener, May 25, 2005

**Surface Transportation Board**

Washington, D.C. 20423-0001

May 25, 2005

JUN 01 2005

Office of Compliance and Enforcement

1925 K Street, N.W., Suite 780

Washington, DC 20423-0001

202-565-1573

FAX 202-565-9011

Mr. Larry Wisener, President
South Plains La Mesa Railroad, LTD.
South Plains Switching, LTD.
P.O. Box 64299
Lubbock, TX. 79464-4299

Re: Service Complaint by PYCO Industries, Inc.

Dear Mr. Wisener:

The purpose of this letter is to advise you of complaints received by this office from Gail Kring on behalf of PYCO Industries, Inc. (copies enclosed). The complaints outline problems with unreliable switching service to the PYCO facilities, provided by South Plains and seek our assistance in resolving this switching problem which Mr. Kring indicates has cost PYCO approximately \$450,000 in lost sales and additional costs. Mr. Kring has also indicated concern for threats of discontinuation of service by South Plains, Switching.

As we have discussed previously, it is our effort to assist rail customers with service problems and to encourage serving carriers to communicate effectively with their customers on service issues so that the Board does not have to become involved formally in these issues. I know that you are aware that your Common Carrier Obligation does not allow you to discontinue authorized services without Board approval, and therefore threats of such action should be avoided. I am sure that your long experience in the railroad industry also provides you with a clear sense of what is required and what is appropriate. As such, I would ask that you meet with Mr. Kring to try and work through his service issues, and that you advise me of the actions taken by South Plains to resolve these issues. Failure to do so will leave me no alternative but to recommend to the Board that we institute, on our own motion, a formal complaint proceeding to address the reasonableness of your actions and the appropriateness of damages to PYCO.

Thank you for your prompt attention to this request and please do not hesitate to contact me if you have any questions.

Sincerely,

Melvin F. Clemens, Jr.

Director

Enclosures

cc: Gail Kring, PYCO Industries.

Appendix II

Verified Statement of Edwin Ellis

STATEMENT OF EDWIN ELLIS

Edwin Ellis, being duly sworn, deposes and states as follows:

1. My name is Edwin Ellis. My business address is 118 S. Clinton St., Suite 300, Chicago, IL 60661. I am President and Chief Executive Officer of Permian Basin Railways, Inc., a short line railroad holding company which owns the West Texas & Lubbock Railroad, Inc. ("WTL") as well as three other short line railroads in the western part of the United States. I also serve as President and Chief Executive of WTL.

2. I submit this statement in support of the Petition of Pyco Industries, Inc. ("PYCO") for Alternative Rail Service under 49 CFR 1146. Because Pyco has found the service of its incumbent rail carrier, South Plaines Switching, Ltd Co. ("SAW"), so inadequate to meet its needs, it has asked WTL to provide service in lieu of SAW and WTL has agreed to do so if the Board approves PYCO's petition.

3. I have read SAW's reply to PYCO's petition and the letter from PYCO's counsel to WTL's counsel John Heffner. PYCO has asked WTL to answer the following six questions as to how it and, based upon its knowledge of short line industry practice, similarly situated short line railroads would respond to PYCO's needs. Here are my responses:

4. **Question: Should PYCO prevail in its alternative service petition, would WTL be able to provide more frequent service (up to two switches per day five days per week) to PYCO without adversely affecting WTL's ability to serve its other customers?** Answer: WTL would expect to provide sufficient switching to enable all its customers, including PYCO and other SAW customers, to ship and receive all their traffic. Presently, in fulfillment of its common carrier obligation, it is often necessary for WTL to provide extra switches or weekend service to its existing customers to enable them to handle all their rail traffic. Consistent with normal industry practice, there is no extra charge for these services unless a service is requested that is outside the normal scope of line-haul and switching services, such as special train service to move a particular car on an expedited basis. We have reviewed PYCO's requirements and have concluded that we can reasonably provide two switches per day, at least five days per week.

5. **Question:** SAW appears to take the position that in discharge of its common carrier obligation, only one switch per day is required, with all additional switching for a customer being a special switch? What has been the experience of WTL's management on this railroad or its affiliated shortlines on providing service over and above one switch per day? **Answer:** WTL's practice, which we believe is necessary to the discharge of our common carrier obligation, is to provide sufficient industry switching to enable spotting and pulling for all the loads that the industry can process. This practice is also in effect at the other railroads under common ownership with WTL. Not all industries process sufficient volume to need to be switched every day while others require more than one delivery and pickup. WTL's service plan takes these issues into account, and WTL has not charged its customers for a second switch.

6. **Question:** Has WTL inspected the track (including the shop and scale tracks serving PYCO) at issue in this proceeding? If so, does WTL believe itself able safely to provide service to current SAW customers, including PYCO, over these tracks? **Answer:** WTL has inspected the tracks in question and believes service can be safely provided over these tracks. The idea that close clearances or crossings without warning devices within industrial areas could be used as a reason for not occupying those tracks is inconsistent with industry practice. Close clearance signs exist as a method of managing employee safety, not as a roadblock to usage. It is our experience that in-plant safety can be effectively managed if the rail carrier and industry work together, as WTL and its sister railroads do with their customers.

7. **Question:** Mr. Wisener makes reference to a number of derailments earlier in 2005, which he alleges are due to track conditions or PYCO's "trackmobile." While PYCO repaired the track in question and the derailment problem insofar as PYCO is aware has ceased, how would WTL have handled these issues had it been providing service in SAW's stead? **Answer:** It is shocking to us that a rail carrier permitted the number of derailments cited without the early institution of a joint safety and derailment prevention program. WTL investigates the cause of each derailment and engages in a planning process, consistent with industry practice, to develop and implement preventive measures that will enable the industry and rail carrier to perform their respective tasks without future derailments. Since the rail carrier understands how railroads work and what causes derailments, the burden is on the rail

carrier to propose and implement training, repairs and other solutions that will prevent future derailments. Clearly, that has not happened to date, and WTL would expect to begin working on these issues at once.

8. **Question: Until November 17, PYCO was allowed to use its trackmobile to interchange and to spot cars at its facility in Lubbock. On or about that date, SAW placed a derail to prevent such interchange and spotting, and SAW now alleges that this is required to meet FRA safety requirements, and in particular an alleged requirement for an FRA certified engineer. How would WTL have discharged its common carrier obligations to interchange and spot cars at PYCO's facility had it been operating this trackage in SAW's stead? Would WTL allow PYCO to operate its trackmobile on WTL's interchange track without violating application Federal Railroad**

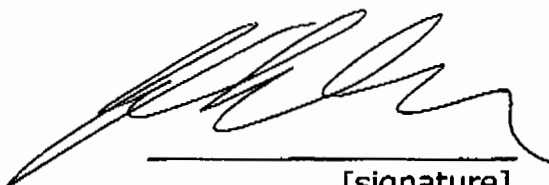
Administration safety regulations? Answer: Actually, placement of the derail increases SAW's common carrier switching obligation by removing the capability of the industry to perform its own switching. WTL's approach with FRA regulations is to work with the FRA to understand what the best practices are that can be adopted in situations where an industry desires to perform some of its own switching. This can include operating windows, a derail placed in a location that permits both rail carrier and industry to perform switching without conflict, qualification of an industry employee on the rules and/or certification as an engineer. SAW is incorrect about an "FRA certified engineer." FRA does not certify engineers, and SAW should know this. Engineers are certified by the rail carrier, and the FRA's role is to inspect the rail carrier's records to see that the rail carrier complied with its own engineer certification program, and to provide feedback for improvement of that program.

9. **Question: In SAW's Reply, SAW suggests that BNSF is to blame for not supplying adequate cars (especially boxcars) for PYCO. How does WTL satisfy shippers' need for car supply on its railroad and how does it satisfy shippers' car supply needs when the line haul carrier is unable to furnish cars? What would WTL have done to satisfy PYCO's needs under the circumstances described here?** Answer: The common carrier obligation includes an obligation to supply cars and that obligation rests with the serving carrier. BNSF states in its line sale agreement to SAW that it will use "reasonable efforts" to supply cars, but it does not commit to taking that responsibility away from SAW. Therefore, SAW is ultimately responsible, and if WTL steps into SAW's shoes, then WTL will be responsible. With respect to the boxcar issue

discussed in SAW's filing, it is WTL's experience that BNSF is unable to supply all the boxcars needed by WTL's customers. As a result, WTL has arranged to lease 50 boxcars in order to fulfill the car supply element of its common carrier obligation. WTL would expect to be responsible for supplying its cars as well as BNSF cars to SAW customers. If WTL does not have sufficient cars, and BNSF can't supply them, then WTL will look to lease additional cars to ensure that SAW customers have adequate car supply.

Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: 1-3-06.



[signature]